

APPEAL NO. 120090
FILED MARCH 22, 2012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A contested case hearing (CCH) was held on December 9, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before him, the hearing officer determined that: (1) the appellant/cross-respondent (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; and (2) as a result of the waiver by the carrier, the respondent/cross-appellant (claimant) sustained a compensable injury on [date of injury].

The carrier appealed the hearing officer's determinations on waiver and on compensability, contending that the carrier timely disputed the claimed injury, and that the carrier did not waive the right to contest compensability because the claimant did not sustain an injury. The claimant responded, urging affirmance of those determinations appealed by the carrier.

The claimant cross-appealed the hearing officer's Findings of Fact Nos. 3 and 4, that on [date of injury], the claimant did not sustain damage or harm to the physical structure of his body and that on [date of injury], the claimant was not injured in the course and scope of employment. The carrier responded, urging affirmance of Findings of Fact Nos. 3 and 4.

DECISION

Affirmed in part and reversed and rendered in part.

In the Background Information section of his decision, the hearing officer stated:

It was uncontroverted that the claimant worked in a very noisy atmosphere at the employer's facility. The claimant worked in that atmosphere from 2004 until he was terminated in 2011 for unspecified reasons. That period of time included a six month layoff in 2005.

* * * *

The claimant was given a hearing test at the time of his hire in 2004 which revealed, according to [Dr. E], who prepared a report dated December 15, 2009, and testified at the hearing, that the claimant

already had moderate to moderately severe hearing loss in his left ear and mild to moderate hearing loss in his right ear at the time he was hired. The claimant, as did all employees at the employer's facility, received yearly hearing examinations. According to Dr. [E's] testimony, and the report from carrier-selected peer reviewer [Dr. P], the hearing exams show that while the claimant's hearing did get worse between 2004 and 2011, it got worse even during the six month layoff period.

* * * *

The claimant had the burden of proof to show that his hearing loss was due to or aggravated by the noisy environment in which he worked at the employer. The claimant presented insufficient diagnostic evidence to support his burden as well as failing to adequately explain how his hearing continued to decline even though he regularly used the employer-supplied ear plugs the whole time he worked for the employer.

CARRIER WAIVER

The hearing officer's determination that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022 is supported by sufficient evidence and is affirmed.

COMPENSABLE INJURY DUE TO WAIVER

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's Finding of Fact No. 4 that the claimant was not injured in the course and scope of employment is supported by sufficient evidence and is affirmed.

The hearing officer indicates in his Background Information and the evidence (including the opinion of the doctor testifying at the request of the carrier at the CCH) reflects that the claimant had a hearing loss between 2004 and 2011, although there is conflicting medical evidence as to the cause of the claimant's hearing loss (aging or noisy environment). However, the hearing officer then found that the claimant did not

sustain damage or harm to the physical structure of his body on [date of injury]. The hearing officer's finding was based on his belief that the claimant's hearing loss or injury did not occur due to the noisy environment in the employer's facility as the claimant described while in the course and scope of employment. If the hearing officer believed that there was no injury, that is no damage or harm to the physical structure of the body, he could not have found liability pursuant to Section 409.021. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) the court stated that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." Applying the rationale in Williamson, carrier waiver cannot create an injury that does not exist. Appeals Panel Decision 070903-s, decided July 27, 2007. The medical evidence clearly established, and the hearing officer clearly believed, that the claimant had hearing loss on [date of injury], and therefore, Williamson does not apply because there was an injury (hearing loss) on [date of injury], although the hearing officer did not find the claimant's injury was in the course and scope of his employment.

Therefore, the hearing officer's Finding of Fact No. 3 that on [date of injury], the claimant did not sustain damage or harm to the physical structure of his body on [date of injury], is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse Finding of Fact No. 3 and render a new Finding of Fact No. 3 that the claimant did sustain damage or harm to the physical structure of his body on [date of injury].

We affirm the hearing officer's determination that as a result of the waiver by the carrier, the claimant sustained a compensable injury on [date of injury].

SUMMARY

We reverse Finding of Fact No. 3 and render a new Finding of Fact No. 3 that the claimant did sustain damage or harm to the physical structure of his body on [date of injury].

We affirm the hearing officer's determination that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

We affirm the hearing officer's determination that as a result of the waiver by the carrier, the claimant sustained a compensable injury on [date of injury].

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge